

IBA Guide on Shareholders' Agreements

Switzerland

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1. Are shareholders' agreements frequent in Switzerland?

Shareholders' agreements are very frequent in privately held companies of all sizes, including even large international companies.

2. What formalities must shareholders' agreements comply with in Switzerland?

There are no formal requirements for shareholders' agreement under Swiss law, similar to most contractual arrangements. Nevertheless, agreements in writing are highly recommended (and in practice always used) for evidence reasons.

3. Can shareholders' agreements be brought to bear against third parties such as purchasers of shares or successors?

Shareholders' agreements are only binding upon their signatories. However, shareholders' agreements often provide that shares shall only be transferred to an acquirer subject to the acquirer adhering to the shareholders' agreement.

4. Can a shareholders' agreement regulate non-company contents?

Swiss contract law is based on the principle of freedom of contract pursuant to which the contents of a contractual arrangement can be freely determined. Consequently, Swiss law does not prevent shareholders' agreements from regulating non-company matters, in addition to customary corporate issues.

5. Are there limits on the term of shareholders' agreements under the law of Switzerland?

There is no specific Swiss law provision that sets forth the term of a shareholders' agreement. Indeed, shareholders' agreement are not specifically regulated by the Swiss Code of Obligations ("SCO") as this type of contractual relationship does not squarely fit within one of the contract classifications provided by the SCO.

Shareholders' agreements with a term of 15 to 20 years (or potentially even longer) are considered valid under Swiss law. Any agreement with an indefinite term may, however, be terminated as case law and opinions of leading scholars have found that such agreements may be considered to excessively restrict the personal and economic freedom of a party pursuant to Art 27 of the Swiss Civil Code ('SCC') or abusive as per Art 2 SCO.

That being said, if a shareholders' agreement does not provide at all for a term, it may be terminated either upon six months' notice (if the shareholders' agreement qualifies as a partnership) or pursuant to general contract law principles.

6. Are shareholders' agreements related to actions by directors valid in Switzerland?

Under Swiss law, provisions in shareholders' agreements related to actions by directors are valid in principle. However, as such shareholders' agreements are only binding on the parties thereto, they have no bearing on the actions of the directors and are not enforceable against them or third parties. Only restrictions on the powers of directors set forth in the company's articles of incorporation are opposable to third parties. Having said that, it is rare in practice to provide for such restrictions in the articles.

7. Does the law of Switzerland permit restrictions on transfer of shares?

Bearer shares issued by a corporation are always freely transferable. Such a transfer is made through the delivery to the acquirer of the share certificates incorporating the shares.

Registered shares issued by a corporation are also freely transferable unless its articles of incorporation subject such transfer to the consent of the board of directors. The transfer of shares cannot however be per se prohibited.

If the transfer of registered shares issued by a privately held company is restricted, the articles of incorporation can set out circumstances in which the board of directors is legitimately allowed to refuse its consent and therefore prevent the transfer of the shares. Such circumstances typically relate to the composition of the company's shareholding (ie, to limit a concentration of shares in one shareholder) or to the independence of the company (ie, to prevent the company from being acquired by a competitor). The board of directors may also refuse its consent if the would-be acquirer does not confirm that it is acquiring the shares for itself and for its own account.

The board of directors may further refuse its consent without giving any reason for such refusal, but in such a case the board of directors must offer to buy back the shares at a price which corresponds to the value of the company as a going concern. If the registered shares are acquired through inheritance, liquidation or matrimonial regime or through debt enforcement proceedings, the board of directors may only refuse its consent if it offers to buy back the shares at a price which corresponds to the value of the company as a going concern. If there is a dispute between the company and the shareholder on such price, the price will be determined by the courts in the context of an appraisal proceeding or by an expert if the parties agree to such an appointment.

In addition, shareholders' agreements often provide for additional restrictions (lock-ups, restrictions on the transferee, etc) and the deposit of the shares with an escrow agent to prevent any breach of the transfer restrictions.

8. What mechanisms does the law of Switzerland permit for regulating share transfers?

Subject to the rules set out above, there are many mechanisms regulating share transfers used in shareholders' agreements governed by Swiss law, such as for example:

- Preemption rights;
- Rights of first refusal;
- Drag- and tag along rights;
- Transfer restrictions (see above);
- Bad and good leaver provisions;
- Call and put options.

9. In Switzerland do by-laws tend to be tailor-drafted, or do they tend to use standard formats?

In Switzerland by-laws tend to be very standard and not tailor made.

10. What are the motives in Switzerland for executing shareholders' agreements?

The main rationale for entering into a shareholders' agreement is the fact that its content is not public (as opposed to the articles of incorporation) and that it allows for a larger (contractual) freedom to arrange the parties' relationship as in the articles.

11. What contents tend to be included in shareholders' agreements in Switzerland?

The following matters are often set forth in shareholders' agreements governed by Swiss law:

- Objectives/purpose of the company;
- Share capital, financing of the company, dividend policy;
- Corporate governance rules relating to:
 - i. Shareholders' meeting
 - ii. Board of directors
 - iii. Management

including minority protection rights, as the case may be;

- Transfer restrictions (see Sections 7/8 above);
- Exit rules/deadlock mechanism;
- Anti-dilution mechanism;
- Reporting rules;
- Duration;
- Confidentiality.

12. What determines the content included in shareholders' agreements in Switzerland?

The content of a shareholders' agreement mainly depends on the shareholding structure of the underlying company (eg, joint venture, family business, MBO/LBO shareholder structure, minority protection) and the objectives of the company.

13. What are the most common types of clauses in shareholders' agreements in Switzerland?

See answers to 11. above.

14. What mechanisms does the law of Switzerland permit to ensure participation of minorities on the board of directors and its control?

Swiss law allows having various classes of shares, which, by virtue of mandatory Swiss corporate law, allow for having at least one representative on the board of directors per share class.

It is also possible to provide for larger minority participation/protection rights in the shareholders' agreement, but such rights are only of a contractual nature.

15. Is it possible in Switzerland to ensure minority shareholder control by means of a shareholders' agreement?

It is possible to ensure control of the company by a minority through the provisions of the shareholders' agreement. That being said, and as set out above, such rights are only binding on the parties and a vote by a shareholder in breach of such shareholders' agreement would be valid from a pure Swiss corporate law viewpoint. The shareholder breaching the shareholders agreements is 'only' exposed to claims for damages.

The possibility also exists under Swiss corporate law to create privileged voting shares which may give control of the company to shareholders holding only a minority of the share capital.

16. What are the usual valuation mechanisms in connection with rights of first refusal or share transfer regulations?

All standard business valuation mechanisms are commonly used in such circumstances.

The only restriction in this respect is that in the event the board of directors offers to purchase the shares in the circumstances set out in Section 7 above, the value of the company as determined by any valuation method has to be at least the value of the company as a going concern.

17. Is it admissible for a shareholders' agreement clause to refer dispute resolution to the courts other than those of Switzerland and/or under a law other than that of Switzerland?

It is admissible to refer dispute resolution to courts outside of Switzerland or to a law other than Swiss law (provided there is actually a foreign element to the shareholders' agreement). That being said, it is not advisable to submit a shareholders' agreement relating a Swiss company to a foreign law or a foreign court given the subject matter of the agreement and the close relationship with Swiss corporate and contractual law.

18. Is it admissible for a shareholders' agreement to include an arbitration clause with seat outside Switzerland and/or under a law other than that of Switzerland?

It is admissible to provide for a foreign law, but this is rarely used and not recommended for the reasons set out in Section 17 above. Arbitration is, however, frequently used in such matters as the parties actually prefer the privacy of arbitral proceedings to (public) court proceedings. The seat of the arbitration panel is not relevant as long as at least one of the arbitrators is familiar with Swiss corporate law.

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